A.F.R.

MC-C266/07

HIGH COURT OF CHHATTISGARH AT BILASPUR

DIVISION BENCH

CORAM: HON'BLE SHRI JAGDISH BHALLA, Ag.CJ. & HON'BLE SHRI DILIP RAOSAHEB DESHMUKH, J.

Writ Petition No. 2951 of 2006

PETITIONER : Control Electronics India, Having its Registered Office at Plot No.42 & 43, "Bharat Building", 2nd Main Road, Renga Nagar, Tiruchirapalli – 620021. Representing Through its Chief Executive Officer, Shri R. Vijay Kumar, S/o. Shri M. Raja, Aged about 53 years, R/o. Plot No.42 & 43, "Bharat Building", 2nd Main Road, Renga Nagar, Tiruchirapalli – 620021.

VERSUS

RESPONDENTS

1. State of Chhattisgarh, Through its Secretary, Department of Energy, Mantralaya, D.K.S. Bhawan, Raipur (C.G.)
2. Chhattisgarh State Electricity Board, Through its Chairman, Dangania, Raipur (C.G.)
3. Chief Engineer, Hasdeo Thermal Power Station, Chhattisgarh State Electricity Board, Korba (West), P.O. Jamnipali, District Korba (C.G.)
4. Superintending Engineer (P&W), Hasdeo Thermal Power Station, Chhattisgarh State Electricity Board, Korba (West), P.O. Jamnipali, District Korba (C.G.)
5. The Boiler Controls Pvt. Ltd., 1/5 Alexandria Road, Tiruchirapalli – 620001.

Writ petition under Article 226/227 of the Constitution of India.

Present : Shri Prafull Bharat, counsel for the petitioner.
Shri Sanjay S Agrawal, Government Advocate for the State / respondent No.1.
Shri AS Gaharwar, counsel for respondents No.2 to 4.
Shri Kanak Tiwari, Senior Advocate with Shri M Siddique, counsel for respondent No.5.

ORAL ORDER

(Passed on 25th June, 2007)

The following oral order of the Court was passed by **Jagdish Bhalla, Actg.C. J.**

This writ petition is directed against the order whereby the tender of the petitioner was rejected and the tender of respondent No.5 was accepted by respondent No.2, basically challenging the said acceptance on the ground of arbitrariness and illegal action of the authorities/respondents.

A preliminary objection has been raised by the respondents that this writ petition is not maintainable as the petitioner had firstly withheld the material fact of filing the civil suit on the same subject matter wherein his prayer for maintaining the status quo was refused by the Civil Judge; secondly, petitioner had not come with clean hands; thirdly ignorance of law is no excuse and fourthly whether the petitioner is involved in Bench hunting. In the above background, the following facts are necessary.

The petitioner has initially filed a Civil Suit No. 26-A/2006 before the Civil Judge Class-II, Kathgora, District Korba on the same subject matter with the following prayers :

(25) **प्रार्थना** :– यह कि वादी इस माननीय न्यायालय से निम्न अनुतोष की प्रार्थना करता है:–

(अ) कि, वादी के पक्ष में प्रतिवादी कमांक 01 एवं 02 के विरुद्ध इस आशय की घोणात्मक आज्ञप्ति पारित किया जावे कि प्रतिवादी कमांक 01 द्वारा प्रतिवादी कमांक 02 के पक्ष में निविदा की स्वीकृति एवं पारित एल.ओ.आई. आदेश दिनांक 22.04.2006 अवैधानिक एवं शून्य हैं।

(ब) यह कि, वादी के पक्ष में प्रतिवादी कमांक 01 के विरुद्ध इस आशय का स्थायी निषेधाज्ञा का आदेश पारित कर निषेधित किया जावे कि प्रतिवादी कमांक 01 के निविदा कमांक 021–10/आई. एण्ड सी. –1/टी.136.04 से संबंधित किसी उपकरण अथवा कार्य प्रतिवादी कमांक 02 से स्वीकार न करें।

(स) यह कि, मामले की परिस्थितियों को देखते हुए माननीय न्यायालय वादी को जो अनुतोष दिलाया जाना उचित समझे दिलायी जावे।

(द) यह कि, वादी को प्रतिवादी कमांक 01 एवं 02 से वाद व्यय दिलाया जावे।

Petitioner has translated the above prayers in English in para 3 of the rejoinder affidavit.

After hearing the parties, the Civil Judge by an order dated 10.05.2006 refused the prayer of the petitioner-plaintiff to maintain status-quo between the parties as prayed. According to the preliminary objection, since the interim relief as prayed was refused to the petitioner-plaintiff, it indulged in bench hunting and filed the present writ petition with the following prayers :

> "7. **RELIEF(S) SOUGHT**
>
> 7.1 This Hon'ble Court may kindly be pleased to call for the entire records concerning the case of the petitioner company from the possession of the respondents, for its kind perusal.
>
> 7.2 This Hon'ble Court may kindly be pleased to issue a writ in the nature of certiorari quashing and setting aside the decision taken by the respondent authorities in rejecting the tender of the petitioner company, by declaring the same to be illegal and inoperative in law.
>
> 7.3 This Hon'ble Court may kindly be pleased to issue a writ in the nature of mandamus directing the respondents to consider the tender submitted by the petitioner company in accordance with law and as per the terms & conditions of the tender documents.
>
> 7.4 Any other relief or reliefs which this Hon'ble Court may think proper in view of the facts and circumstances of the case, may also kindly be granted.
>
> 7.5 Cost of the petition be also awarded."

According to the rules of this Court it is mandatory for the petitioner to categorically mention in the pleadings of the writ petition whether any similar case has been filed in some other Court or not ? The said fact has been indicated as under :

> "Para 09 of the writ petition- **REMEDIES EXHAUSTED :**
>
> The petitioner declares that in view of the facts and circumstances of the case, he is left with no other alternative remedy except to approach before this Hon'ble Court for redressal of his grievances.

Para10 of the writ petition - **MATTER NOT PENDING BEFORE ANY OTHER COURT OF LAW:**

The petitioner categorically declared that the matter regarding which this petition has been made, is not pending before any other Court of law."

No application was moved by the petitioner/plaintiff before the Civil Court in the pending matter referred to hereinabove for withdrawal of the civil suit before filing of this writ petition on 21.06.2006. It is pertinent to indicate that para 10 of the writ petition quoted hereinabove is silent about the pendency of the Civil Suit. This silence of the petitioner is to be examined in light of the facts stated by the petitioner in the writ petition and in the rejoinder affidavit wherein an attempt has been made to justify why the petitioner has failed to mention filing of the civil suit in the civil Court with respect to the same subject matter. Para 2 of the rejoinder affidavit reads as under :

"2. The res. no.2 to 4 has filed their return and has contended that the petitioner was not found fit in Techno Commercial Bid "Part-II" as per the condition of tender, therefore, the price bid offered by the petitioner was not opened. The res. no. 2 to 4 has further contended that the petitioner had filed a civil suit arising out of the same transaction and has not mentioned this fact in his writ petition. The res. no. 2 to 4 has further contended that since the petitioner has not completed the other formalities required for submission of tender and looking to the fact that he was not qualified in Techno Commercial Bid his price bid was not opened. It is further contended that the decision taken by res. no. 2 to 4 was passed in bonafide exercise of powers after following due procedure by the competent authority. Since, the res. no. 2 to 4 had made submission contrary to the facts it is necessary to controvert the allegations leveled by res. no. 2 to 4."

In the above paragraph, the petitioner has admitted that **petitioner had filed a civil suit arising out of the same transaction and has not mentioned this fact in the writ petition.** Further in para 3 of the rejoinder

affidavit, the petitioner has not disputed filing of the civil suit as referred hereinabove and has further attempted that the suit filed by the petitioner though arising out of the same transaction, was for a different relief altogether. Para 3 of the rejoinder affidavit having the translated part of the prayer which has been referred hereinabove in Hindi Dev Nagri is quoted below :

> "Para 3 of the rejoinder affidavit : - The contention of the res. No.2 to 4 that the petitioner has filed a civil suit before the Court of Civil Judge Class-II, Katghora, Distt. Korba is not disputed. It is respectfully submitted that the suit which was filed by the petitioner though arising out of the same transaction was for a different relief altogether. The relief which was claimed by the petitioner before the Civil Court was as under :
>
> (i) To issue a declaration to the effect that the tender of def. no.2 accepted by def. No.1 and the LOI order dated 22.04.2006 issued in favour of defendant no.2 is illegal and void.
>
> (ii) To issue a permanent injunction in favour of plaintiff restraining the def. No.1 not to receive the instrument or work from def. No.2 in respect to tender no.021-10/I&C.-1/T 136-04.
>
> (iii) That looking to the circumstances of the case to grant any other relief.
>
> (iv) To grant cost of litigation from def. no.1 & 2. "

Learned counsel for the petitioner submitted that the relief claimed before this Hon'ble Court is for quashing of the decision taken by the respondent authorities in rejecting the tender of the petitioner's company and for a direction to consider the tender submitted by the petitioner's company in accordance with law. It is further submitted that since the relief claimed before the Civil Court as well as before this Hon'ble Court are different, the petitioner has not mentioned this fact in paras 9 and 10 of the writ petition. It is further indicated that since the petitioner was filing the writ petition arising

out of the same transaction, the petitioner on 19.06.06 advised the counsel appearing before the Civil Court to withdraw the suit filed by it. In pursuance of the direction given by the petitioner the counsel appearing before the Civil Court on 22.06.2006 filed an application to withdraw the suit along with an application to hear the application for withdrawal of the suit expeditiously. Copies of application dated 22.06.2006 are collectively filed herewith as Annexure-P/4. It is further submitted that the Presiding Officer put the matter for 22.07.06, and on 22.07.06 as well as on 24.08.06 the Presiding Officer was on inspection and ultimately on 12.09.06 the suit was dismissed for want of prosecution. Copy of order sheets from 22.06.06 till 12.09.06 is filed herewith as Annexure-P/5. In these circumstances, it was submitted that the petitioner has not suppressed anything from this Hon'ble Court, since the relief claimed before the Civil Court as well as before this Hon'ble Court were entirely different. Therefore, the petitioner has not mentioned this fact that for a different relief he had filed a suit before the Civil Court.

An attempt has been made by the petitioner to justify its stand as to why petitioner has not referred, filing of the civil suit in paras 9 and 10 of writ petition. We find that the petitioner has admitted in paras 2 and 3 of the rejoinder affidavit in totality that both writ petition and civil suit are arising out of the same transaction. We have further analytically examined the occasion of filing of the writ petition and we come to the conclusion that since the petitioner's prayer for maintaining status quo was refused by an order dated 10.05.2006 by the Civil Court, the petitioner decided to approach this Court by molding relief which most of the times can be little different from the suit for the reason that in writ petitions the prayer is to be made *vis-à-vis* for issuance of particular writ in its nature.

We are of the considered opinion that it is the bounded duty of the petitioner with all fairness to make mention about the pendency of the civil

suit. There cannot be any doubt that the subject matter of the civil suit and the writ petition is the same and the petitioner cannot pursue two parallel proceedings at the same time. In **Jai Singh Vs. Union of India & others,** reported in **AIR 1977 SC 898,** Hon'ble Apex Court observed that "the appellant cannot pursue two parallel remedies in respect of the same matter at the same time". The above case has also been relied upon in recently pronounced judgment in the case of **Arunima Baruah Vs. Union of India & others,** reported in **2007 (4) SCJ 40.** Beside the law laid down by the Apex Court in this case, we even find similarity on the facts of the two cases i.e. when the interim relief of maintaining status quo was refused writ petition has been filed by the respective petitioner.

We have further examined whether the petitioner has approached this Court with clean hands ? We find - (i) the petitioner failed to indicate in paras 9 and 10 of the writ petition about filing of the civil suit as indicated above; (ii) the petitioner even while filing the application for withdrawal of the civil suit by moving an application on 22.06.2006 had prayed in the application for dismissal of the civil suit as withdrawn and had further prayed for liberty to file fresh suit whenever need be. Now, the question is why liberty was sought when the petitioner has already filed the writ petition. It leads us to the possible conclusion that in case the petitioner does not get desired relief from the High Court he can revert back to the Civil Court to pursue his matter again. Thereby it is crystal clear that the petitioner wanted to avail two remedies that too without closing its option in either of the Court. Our doubt is further strengthened from the fact that after the interim relief was granted by this Court on 23.06.2006, thereafter, the petitioner lost all its interest in pressing the application for withdrawal of the civil suit with liberty for filing fresh suit whenever need be and in process the said application was dismissed for non-prosecution on 12.09.2006. Learned counsel for the petitioner made an attempt to wriggle out of the order passed by the Civil

Court dismissing the suit in default by indicating that twice the Presiding Judge was not available.

The petitioner has failed to divulge the vital information that it had already filed a civil suit wherein the request for maintaining status quo has already been refused. Only on this ground, the petition can be summarily thrown out at any stage of the litigation. In **MCD Vs. State of Delhi & another, (2005)4 SCC 605**, Hon'ble Apex Court expressed its opinion on the issue in question, "the contesting respondent has come to the High Court with unclean hands and withholds a vital document in order to gain advantage on the other side. It was further opined that such incumbent would be guilty of playing fraud on the Court as well as on the opposite party. A person whose case is based on falsehood can be summarily thrown out at any stage of the litigation."

It was not open for the petitioner to file this writ petition during the pendency of the civil suit and then in the process moving an application for withdrawal of the civil suit with liberty, ultimately by abandonment of the suit. The said principle has been incorporated as a rule in the realm of suits. Order 23 Rule 1 of Code of Civil Procedure deals with the withdrawal of suit or abandonment of part of claim, sub-rule (3) indicates that the Court may in certain circumstances grant permission to withdraw the suit with liberty to institute fresh suit in respect of the subject matter of such suit. Sub-rule (4) reads as under :

> "(4) Where the plaintiff –
>
> (a)abandons any suit or part of claim under sub-rule (1), or
>
> (b)withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),
>
> he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

There is one more interesting question of jurisdiction has come in light before us, the present matter is cognizable by the Division Bench under Rule 23 (iv) of the Chhattisgarh High Court Rules, 2005. Rule 23 (iv) of the Rules is quoted below :

> "**23.** The following matters shall be heard and disposed of by a Division Bench.
>
> **********
>
> (iv) Relating to contract/Tender concerning Government/Public Undertaking/ Local Bodies."

In spite of the said rule, the Registry reported that the matter is cognizable by Hon'ble Single Judge. Therefore, it was placed before Hon'ble Single Judge. Learned counsel for the petitioner when confronted with the aforesaid rules, an attempt has been made to take shelter of the report of the Registry. Before this Court, learned counsel for the petitioner could not dispute that this petition is cognizable by a Division Bench. However, with all fairness the said provision of law should have been placed before the Hon'ble Single Judge.

We find force in the arguments of learned counsel for the respondents with regard to bench hunting. In various judgments the Apex Court has very heavily come on and criticized the bench hunting. Bench hunting has been deprecated by the Apex Court in the cases of **Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P. Gwalior & others, (1987)1 SCC-5** and **Upadhyay & Co. Vs. State of U.P. & others,** reported in **(1999) 1 SCC-81.** Taking note of the law laid down by the Apex Court with respect to the bench hunting, we find that the petitioner had no reason to approach this Court when already a civil suit was pending. Such an action of the petitioner definitely falls within the category of bench hunting. In light of the facts and law referred hereinabove by the Apex Court, we are of the considered opinion that the petitioner has no right to avail two remedies

simultaneously, first before the Civil Court and then filing this writ petition by raising various disputed questions of facts which cannot be examined by the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. We are of the further opinion that the High Court exercises extraordinary jurisdiction under Article 226 of the Constitution, a discretionary jurisdiction, equity jurisdiction and therefore it was called Court of equity as well. The facts and circumstances of the case show that it is a clear case of abuse of process of Court and of law. The Apex Court in the case of **Municipal Corporation of Delhi Vs. Kamla Devi & another,** reported in **(1996)8 SCC 285** held as under :

> "The facts and circumstances of the case show that it was a clear case of abuse of process of Court and of law. The averment made in the plaint to the effect that the officers of the appellant-Corporation went to Ghaziabad to attach the movables of the respondent or her grandchildren to realise the tax under the order of assessment was a total falsehood and a mere pretence to create jurisdiction in Ghaziabad court as no document had been filed before the Ghaziabad Court in support of the allegations. Moreover, the frame of the suit and the language and terms in which the declaration and prohibitory injunction were asked for suggest a clear attempt to overreach the process of Court. The object clearly was to obtain a declaration that the assessment order was illegal and invalid from the Court outside Delhi. The fact that the plaintiff-respondent chose to conceal the fact of her filing the appeal against the assessment order is also indicative of the mala fides on her part. The bill of demand pursuant to the assessment order was sent to the respondent after filing of the suit. Once the Supreme Court is satisfied that the respondent abused the process of law and misused the legal system, the objections put forward by the respondents' counsel are of no consequence. The Supreme Court is entitled to act in such cases to prevent such abuse and misuse. Accordingly, the judgment and decree of the Civil Judge, Ghaziabad is set aside. In view of the reprehensible conduct, the respondents are directed to

pay exemplary costs in a sum of Rs.50,000/-. Such practices ought to be put down with a stern hand so that other similarly mined may desist from indulging in similar acts. "

Similar facts and circumstances have been critically examined by the Apex Court in the case of **Arunima Baruah (Supra)**. The view expressed by the Apex Court squarely covers this writ petition. In the said case it has been held as under :

> **"14.** In Halsbury's Laws of England, Fourth Edition, Vo.16, pages 874-876, the law is stated in the following terms :
>
> "1303. He who seeks equity must do equity. In granting relief peculiar to its own jurisdiction a court of equity acts upon the rule that he who seeks equity must do equity. By this it is not meant that the Court can impose arbitrary conditions upon a plaintiff simply because he stands in that position on the record. The rule means that a man who comes to seek the aid of a court of equity to enforce a claim must be prepared to submit in such proceedings to any directions which the known principles of a court of equity may make it proper to give; he must do justice as to the matters in respect of which the assistance of equity is asked. In a court of law it is otherwise; when the plaintiff is found to be entitled to judgment, the law must take its course; no terms can be imposed.
>
> ********* ********** *******
>
> 1305. He who comes into equity must come with clean hands. A court of equity refuses relief to a plaintiff whose conduct in regard to the subject matter of the litigation has been improper. This was formerly expressed by the maxim "he who has committed iniquity shall not have equity", and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation, or where the plaintiff sought to enforce a security improperly obtained, or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money. Later it was said that the plaintiff in

equity must come with perfect propriety of conduct, or with clean hands. In application of the principle a person will not be allowed to assert his title to property which he has dealt with so as to defeat his creditors or evade tax, for he may not maintain an action by setting up his own fraudulent design.

The maxim does not, however, mean that equity strikes at depravity in a general way; the cleanliness required is to be judged in relation to the relief sought, and the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal as well as in a moral sense. Thus, fraud on the part of a minor deprives him of his right to equitable relief notwithstanding his disability. Where the transaction is itself unlawful it is not necessary to have recourse to this principle. In equity, just as at law, no suit lies in general in respect of an illegal transaction, but this is on the ground of its illegality, not by reason of the plaintiff's demerits. "

22. *Ubijusibi remedium* is a well known concept. The court while refusing to grant a relief to a person who comes with a genuine grievance in an arguable case should be given a hearing. {See.Bhagubhai Dhanabhai Khalsi (Supra)}. In this case, however, the appellant had suppressed a material fact. It is evident that the writ petition was filed only when no order of interim injunction was passed. It was obligatory on the part of the appellant to disclose the said fact. "

On the consideration of the facts and circumstances of the case and in light of the law laid down by the Apex Court, we are satisfied that it is a clear case of abuse of process of Court and of law, hence writ petition is dismissed as not maintainable and interim relief is discharged. It is a fit case wherein exemplary cost is to be awarded against the petitioner. Accordingly, we impose cost in a sum of Rs.25,000/- which is to be deposited by the petitioner within one month from today in the Registry of this Court. The Registry shall

in turn pass on the said amount to **Chhattisgarh State Legal Services Authority.**

We are of the further considered opinion, that inspite of our above view, no litigant can be remediless under the law and therefore, the dismissal of this writ petition will not disentitle the petitioner to move an application for restoration of the civil suit which has been dismissed in default and pursue remedy invoked earlier.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Sd/-
Acting Chief Justice